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No. 04 - 943

In the
Supreme Court of the United States
October Term, 2004

KITTERY RETAIL VENTURES, LLC, *et al.*,
Petitioners,
v.
TOWN OF KITTERY, MAINE,
Respondent.

On Petition for Writ of *Certiorari*
to the Supreme Judicial Court of Maine

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

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Pursuant to Supreme Court Rule 37.2 (a), counsel for *Amicus Curiae* has attempted to secure written consent for the filing of the attached Brief of *Amicus Curiae* from counsel for the Petitioners and Respondent. Although counsel for Petitioners granted such consent, counsel for Respondents did not respond to the request of *Amicus* for written assent pursuant to Supreme Court Rule 37.2 (a). Accordingly, counsel for *Amicus Curiae* hereby moves this Court pursuant to Supreme Court Rule 37.2 (b) for leave to file the Brief *Amicus Curiae* which is submitted herewith. *Amicus* makes this motion on the following grounds:

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon municipal attitudes towards real estate development and growth. A healthy real estate development climate is a mark of a vital and vibrant economy and depends on secure rights for property owners. Furthermore, some of NELF's members are directly interested in the issue of real estate development and land use because they are involved in developing, owning, managing, insuring, and/or financing real property.

NELF has regularly appeared in state and federal

courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001). NELF served as *amicus curiæ* supporting the Petitioners in this matter at the Supreme Judicial Court of Maine below. *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 2004 ME 65 (Me. 2004).

Counsel for Petitioners assented in writing to the submission of the attached Brief of *Amicus Curiæ* pursuant to Supreme Court Rule 37.2 (a), a copy of which letter has been submitted together with this Brief to the Clerk of this Court. On February 4, 2005, counsel for *Amicus* contacted William Dale, Esq., counsel for the Town of Kittery, to request written assent for *Amicus* to submit the attached Brief pursuant to Supreme Court Rule 37.2 (a). Counsel for the Town of Kittery did not submit such written assent by the required filing time for the attached Brief, nor did counsel indicate orally counsel's position in regard to the filing of such Brief. Counsel for the Town of Kittery did submit written assent for *Amicus* to file its Brief of *Amicus Curiæ* before the Supreme Judicial Court of Maine.

Amicus seeks to bring to the Court's attention its views, and those of its supporters, concerning the effect of the decision below on the costs of and impediments to rational real estate development. *Amicus* believes that this brief may provide an additional perspective which may aid the Court in

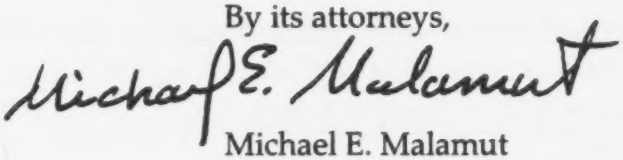
determining whether to grant the petition for a writ of *certiorari*.

Wherefore, NELF respectfully requests that this Court grant *Amicus Curiae* leave to file the attached brief in support of the Petition for a Writ of *Certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,



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Dated: February 14, 2005

QUESTION PRESENTED

Whether a landowner with a pending but unvested permit application is entitled to judicial review under the Due Process Clause when the *retroactive* application of a new zoning law causes the permit to be denied?

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIÆ*[1]

Amicus seeks to bring to the Court's attention its views, and those of its supporters, concerning the availability of relief under the due process clauses of Fifth and Fourteenth Amendments to the United States Constitution for property owners and developers directly targeted for denial of permits by populist anti-growth movements.

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that neither counsel for Petitioners nor Respondent authored this Brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon municipal attitudes towards real estate development and growth. A healthy real estate development climate is a mark of a vital and vibrant economy and depends on secure rights for property owners. Furthermore, some of NELF's members are directly interested in the issue of real estate development and land use because they are involved in developing, owning, managing, insuring, and/or financing real property.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001). NELF served as *amicus curiæ* supporting the Petitioners in this matter at the Supreme Judicial Court of Maine below. *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 2004 ME 65 (Me. 2004).

Amicus believes that private property and the protection of owners' rights to reasonable development based on established policies are important building blocks of democracy. If the Maine Supreme Judicial Court's decision in this matter is not revisited, property developers will effectively be stripped of the statutory protections of preliminary approvals, such as Maine's "substantial completion," and arbitrarily subject to *ex post facto* land-use restrictions after expenditure of considerable sums in reasonable reliance on such preliminary approvals. The cost of property development will inevitably be higher, as developers will need to compensate for the additional risk that anti-development policies might stymie a project into which a developer has invested considerable financial resources based on preliminary approval. *Amicus* is further concerned that the opinion below in this case will be read to permit regulators and municipal residents to constrain development at any time, in any place, for any reason, so long as they act by referendum.

Amici Curiæ therefore believe that this brief provides an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, Kittery Retail Ventures, LLC, *et al.* Pursuant to Supreme Court Rule 37.2 (b), counsel for *Amicus* has moved for leave for the filing of this Brief.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Petitioners Kittery Retail Ventures, LLC, ("KRV") *et al.* The Brief of *Amicus* emphasizes in particular the following:

On June 13, 2000, the Respondent, the Town of Kittery ("Town"), approved by referendum an amendment to its Zoning Code that eliminated transferable development rights

and reduced the maximum buildable area for a parcel from thirty to fifteen percent. Pet. App. at A-3, ¶ 4. The development restrictions of the June 13 referendum did not apply to the Petitioners' Kittery Marketplace project because the Kittery Planning Board approved the project's site plan as substantially complete on July 13, 2000, before the referendum's effective date. Pet. App. at A-3, ¶ 5. Under Maine law, the determination of substantial completion constituted "substantive review," which grandfathered the Petitioners' development application and permitted it to proceed under the land-use regulations then in effect, which would include transferable development rights and the thirty percent maximum lot coverage requirement. 1 Me. R.S.A. § 302.[2]

On September 26, 2000, the Town by a further referendum amended the June 13 referendum by making it

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2 **Construction and effect of repealing and amending acts.** . . . Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby. For the purposes of this section, a proceeding shall include but not be limited to petitions or applications for licenses or permits required by law at the time of their filing. For the purposes of this section and regardless of any other action taken by the reviewing authority, an application for a license or permit required by law at the time of its filing shall be considered to be a pending proceeding when the reviewing authority has conducted at least one substantive review of the application and not before. For the purposes of this section, a substantive review of an application for a license or permit required by law at the time of application shall consist of a review of that application to determine whether it complies with the review criteria and other applicable requirements of law.

1 Me. S.R.A. § 302.

retroactive to September 30, 1999 (the "Retroactive Referendum"). Pet. App. at A-4, ¶ 6. The Retroactive Referendum was specifically targeted at preventing the development of Kittery Marketplace and one other outlet mall (the "JSS Parcel") equally unaffected by the June 13 referendum because it was also sufficiently advanced in the permitting process.[3] *See* Plaintiffs' Statement of Material Facts, ¶ 29 & Ex. G, found in Appellants' Appendix in the Maine Supreme Court at 46 & 86.

The citizens' group that sponsored the Retroactive Referendum circulated an advertisement that explicitly stated: "The Planning Board has pending applications for retail development of two large-scale malls . . . **which would double the size of current malls!** . . . **Vote YES to stop malls in the Mixed Use Zone on Route 1** . . . ." *See* Plaintiffs' Statement of Material Facts, Ex. G, found in Appellants' Appendix in the Maine Supreme Court at 86 (emphasis in original). Only these two planned outlet malls were affected by the Retroactive Referendum. The Retroactive Referendum could have had no other purpose but to prevent development of the Kittery Marketplace and JSS parcels.

SUMMARY OF ARGUMENT

The Maine Supreme Judicial Court erroneously concluded that the Petitioners had an insufficient property interest to support a substantive due process claim despite the facts that (1) they had obtained substantive review of their application, vesting them with the right to proceed under then existing regulations promulgated pursuant to 1 Me. R.S.A. § 302, and (2) their development rights were then abrogated by

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3 The other development was the subject of *JSS Realty LLC v. Town of Kittery*, 177 F. Supp. 2d 64 (D. Me. 2001).

a targeted retroactive referendum. *Amicus* supports the contrary position of the Third Circuit that property ownership alone, and not a regulatory entitlement, is an adequate basis for a substantive due process claim charging arbitrary regulatory conduct. This Court should grant the petition for *certiorari* because the decision below would improperly allow municipalities to evade responsibility for targeted disapprovals of development applications.

ARGUMENT

I. The retroactive zoning referendum prohibiting development of the Kittery Marketplace illustrates the harm caused when states define away property rights as unworthy of protection by the due process clause.

The Town violated the Petitioners' rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution[4] because the Retroactive Referendum targeting Kittery Marketplace destroyed development rights granted under Maine law retroactively and arbitrarily targeted Kittery Marketplace based on populist anti-development animus. By highly technical interpretation, the Maine Supreme Judicial Court permitted the Retroactive Referendum to eliminate the Petitioners' right to grandfathered status under the existing regulatory regime at the time their application had received substantive review. 1 Me. R.S.A. § 302.

This case illustrates the tautological nature of defining "property" for due process purposes solely in terms of a claim

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4 The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Fourteenth Amendment states: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

of entitlement to a development permit, as the Maine Supreme Judicial Court does, relying on Eleventh Circuit precedent. *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 1193, 2004 ME 65, ¶ 32 (Me. 2004) (citing *Reserve Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1379 (11th Cir. 1994)). *See* Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 61, 93 (2000) ("[T]he entitlement rule is circular. It allows a local government to define what it wants to recognize as an entitlement through its land use ordinance by making land use approvals discretionary."). As indicated by the Petitioners, this interpretation is followed by the Second, Fourth, and Eight Circuits. Petition at 19–23. *See Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997); *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989). These courts hold that the due process clause protects not traditional property, but property interests that rise to the level of an entitlement. In the land-use context, that means only development permits that are guaranteed under existing regulations, without any role for regulatory discretion, are entitled to due process protection. Mandelker, 3 WASH. U. J.L. & POL'Y at 66.

The Third Circuit, on the other hand, defines property protected by the due process clause, in conformity with history and common sense, to include traditional property ownership itself. *DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d 592, 600–01 (3d Cir. 1995) ("[O]ne would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership."), *cert. denied*, 516 U.S. 937 (1995), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d

392, 400 (3d Cir. 2003). Under this interpretation, any property owner would have a basis for making a due process claim if treated arbitrarily and irrationally during the course of the land-use application process. Mandelker, 3 WASH. U. J.L. & POL'Y at 90–92.

The Maine definition of due process "property," as limited to entitlement to a development permit, leads to results such as this in which state courts are encouraged to define away development rights as insufficiently certain to sustain a due process challenge. Defining property as entitlement to a specific development permit, the Maine Supreme Judicial Court was able to brush aside the Petitioners' grandfathered development rights because they did not qualify as "vested rights" as defined in other Maine cases.[5] Grandfathered substantive review rights, the court said, were merely a matter of statutory interpretation, which did not rise to the level of "vested rights," and therefore could be eliminated retroactively by a sufficiently specific ordinance. *Kittery Retail Ventures*, 856 A.2d at 1191, 2004 ME 65, ¶ 21.

The court similarly cursorily dismissed Petitioners'

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5 Maine law recognizes both legal and equitable "vested rights," which entitle a specific development plan to be completed unaffected by subsequent regulatory changes. Under Maine law, this is a stronger protection than substantive review rights, which entitle a developer to maintain the regulatory *status quo* through the completion of the application process, but does not guarantee a specific development plan. A developer may obtain legal vested rights only by commencing physical construction after issuance of a building permit. *Sahl v. Town of York*, 760 A.2d 266, 269–70, 2000 ME 180, ¶¶ 12–13 (Me. 2000); *Seven Islands Land Co. v. Maine Land Use Reg. Comm'n*, 450 A.2d 475, 481 (Me. 1982). Alternatively, a developer may obtain equitable vested rights in Maine through, *e.g.*, "bad faith" zoning. *Kittery Retail Ventures*, 856 A.2d at 1191, 2004 ME 65, ¶ 24; *Thomas v. Zoning Board of Appeals of Bangor*, 381 A.2d 643, 647 (Me. 1978).

argument that the Retroactive Referendum targeted Kittery Marketplace, constituting "bad faith" zoning, which should create equitable vested rights under Maine law. Appellants' Brief in the Maine Supreme Court at 15–19. *See Thomas v. Zoning Board of Appeals of Bangor*, 381 A.2d 643, 647 (Me. 1978). Under Maine law, a zoning decision made on a discriminatory basis for the purpose of preventing an otherwise legal use by the applicant constitutes "bad faith" zoning. *Kittery Retail Ventures*, 856 A.2d at 1191, 2004 ME 65, ¶ 24; *Thomas*, 381 A.2d at 647. Nevertheless, the Maine Supreme Judicial Court completely ignored the Petitioners' arguments that the townspeople, through the targeted populist *referendum*, engaged in bad faith conduct creating clearly constitutionally protected vested property rights. Similar populist anti-development prejudice has become widespread in many localities. *See* William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood,"* 7 Geo. Mason L. Rev. 881, 881-82 (1999) ("NIMBYs ['Not In My Back Yard' advocates] are mostly nearby homeowners who object to further development within their community.").

Rather than dealing with the targeted anti-growth discriminatory animus underlying the Retroactive Referendum, the Maine court's entire discussion of bad-faith-conduct-based vested rights was an exoneration of the conduct of town officials, whose conduct the Petitioners did not question. *Kittery Retail Ventures*, 856 A.2d at 1192–93, 2004 ME 65, ¶¶ 28–31. By failing even to discuss the possibility of the referendum's bad faith targeting, as indicated by the referendum supporters' campaign literature aimed at stopping Kittery Marketplace and only one other development, the Maine court implicitly suggests that bad faith municipal conduct may be insulated

from review because it takes place through a referendum rather than by town officials.

The referendum process allows potentially uninformed popular sentiment to influence land-use decision making. If courts, such as the Maine Supreme Judicial Court, will not even review such referendum decisions as affecting a protected due process property interest, property owners and developers will be faced with high costs in time and money for increasingly arbitrary and unpredictable returns.[6] Uncertainty caused by such strong anti-development sentiments limits much needed development and increases the premiums developers need to calculate before considering a project. That means that those types of projects that return high premiums will be favored over more economically efficient low-premium projects.

If traditional property ownership itself is not sufficient to warrant substantive due process protection, property owners will have no protection against the most egregious populist anti-development land-use decisions, such as the targeted retroactive zoning amendment in this case. Because the Maine Supreme Judicial Court defined away any guarantee of development under Maine law, the Petitioners had no "entitlement" to a development permit. Hence, under the Maine court's interpretation, they had no rights at all under the

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6 For example, in this case, Kittery Retail Ventures spent over $300,000 on its the development application after receiving assurances from town officials that Kittery Marketplace could receive grandfathered status protecting it from subsequent zoning amendments. *See* Plaintiffs' Statement of Material Facts, ¶¶ 1, 40, found in Appellants' Appendix in the Maine Supreme Court at 39 and 48; Affidavit of Edward W. Huminick, Plaintiffs' Statement of Material Facts, Ex. A, ¶ 2 (purchase price), ¶ 27 (development costs after assurances of zoning stability), found in Appellants' Appendix in the Maine Supreme Court at 50 and 56.

due process clause to fight arbitrary, targeted land-use regulation.

Under the Third Circuit's common sense interpretation of the due process clause, the Petitioners' underlying property rights in the Kittery Marketplace site alone are a sufficient basis for invoking due process clause protections. The question then properly focuses on the extent of government misconduct that warrants sanction under the due process clause. *See United Artists Theatre Circuit*, 316 F.3d at 400. The Maine Supreme Judicial Court's decision below, to the contrary, restricts due process protections to developers entitled to a specific development permit. This interpretation gives populist anti-growth movements significant opportunities to derail real estate development approved by professional planners, irrespective of the professionals' judgment that the project should go forward and no matter how much money the developers have devoted to the project, causing significant economic inefficiencies.

II. Property ownership warrants substantive due process protection from discriminatory and arbitrary conduct by local land-use decision makers.

The plain wording of the due process clauses of the United States Constitution grant significant protection to property. U.S. Const. Amend. V, Amend. XIV. When the due process clauses were written, "property" above all meant ownership of real property. *See* James Madison, *Property*, in THE MIND OF THE FOUNDER 186 (Marvin Meyers ed., rev. ed. 1981) (originally published in NATIONAL GAZETTE, March 29, 1792) (property, "[i]n its larger and juster meaning ... embraces everything to which a man may attach a value and have a right .... [A] man's *land*, or merchandise, or money is

called his property." (emphasis added)). "[T]he Framers would have considered [it] obvious [that] our civil rights [protected by the due process clauses] include the full use and enjoyment of the property we own, free from arbitrary or unreasonable government interference." Stewart M. Wiener, Comment, *Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467, 1488 (1996). *See id.* at 1491 ("[T]he Framers[] inten[ded] to provide strong protection for individual rights in property").

Substantive due process is the means to protect real property owners from irrational or arbitrary land-use decisions, which includes decisions by popular referendum based on discriminatory animus rather than fact. *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928).[7] *See* Brian W. Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 WASH. U. J.L. & POL'Y 583, 585 (2000).[8] To comply with due process, land-use regulations as applied must "bear a *substantial* relation to the public health, safety, morals, or general welfare." *Nectow*, 277 U.S. at 188 (emphasis added). Moreover, whether a land-use regulation complies with due

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7 A court may set aside a land-use decision that "'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Nectow*, 277 U.S. at 187–88 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

8 The right not to be subject to arbitrary or capricious action by a governmental, legislative, or administrative action is a substantive due process right. In the case of irrational or wrongful and use regulatory decisions that may not amount to a taking, landowners and developers have relied on substantive due process claims in federal court as an important means to remedy such action.

Blaesser, 3 WASH. U. J.L. & POL'Y at 585.

process requirements is a question of fact. *Id.*

In this day and age, many land-use decisions involve considerable discretion on the part of local administrative decision makers. Blaesser, 3 WASH. U. J.L. & POL'Y at 600 ("[M]any local governments are currently attempting to address increasingly complex, sometimes subjective issues—preservation of 'community character,' urban design, 'cumulative impacts' of land uses, growth control, environmental protection, affordable housing and infrastructure needs—through discretionary regulation . . . ."). *See id.* at 584. The infusion of considerable discretion into regulatory determinations allows a considerable role for "improper motives such as personal animus, political bias, or conflicts of interest" in the decision making process. *Id.*

Under the "entitlement to a permit" approach adopted by the Maine Supreme Judicial Court, those highly discretionary zoning decisions in most need of review are precisely the decisions that are exempt from due process review. While the discretion of individual decision makers is undoubtedly entitled to substantial deference, unbridled discretion insulated from review inevitably leads to arbitrary and capricious decisions. "Power tends to corrupt and absolute power corrupts absolutely." John Dalberg-Acton (Lord Acton), *Letter to Bishop Mandell Creighton* (April 5, 1887).

Abuse of regulatory discretion can only be redressed if this Court adopts the Third Circuit's definition of "property" for substantive due process as protecting traditional property ownership and not only entitlement to a specific land-use permit. *See* Blaesser, 3 WASH. U. J.L. & POL'Y at 601. That way, there will be a recourse for property owners who are treated arbitrarily during the application process, before their permit

application receives final approval. Otherwise, those forms of arbitrary regulatory conduct most likely to cause the greatest abuse to property owners' rights, because they allow the greatest leeway for regulators' potentially arbitrary discretion, will be those most insulated from any remedy.

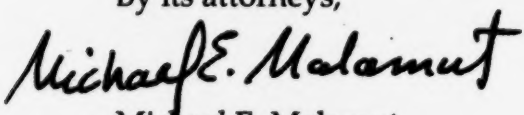
CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioners Kittery Retail Ventures, LLC, *et al.* for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,



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